Supreme Court, U.S.
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No. 92-749

In The

Supreme Court of the United States

October Term, 1992

JESSE CAMPOS, *ET AL.*,

Petitioners,

v.

THE CITY OF HOUSTON, *ET AL.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to hear a petition for writ of certiorari when the petitioners disagree only with the lower court's rationale and not with its decision?

2. Does this Court have jurisdiction to hear a petition for writ of certiorari when any potential relief is either moot or is barred by a final judgment from another court?

3. Does a district court have jurisdiction to consider a declaratory judgment counterclaim filed by a governmental body when the purpose of that counterclaim is to determine the validity of the existing election system and, if the existing system is invalid, to obtain an interim order to govern the conduct of an impending election?

4. Are there any circumstances in which a district court would have authority to order use of a redistricting plan that had not been precleared under section 5 of the Voting Rights Act when a precleared plan was available?

LIST OF PARTIES

The list of parties set forth in the Petition for Writ of Certiorari is correct in regard to the petitioners. The list of respondents, however, does not reflect the substitution of successors in office after the November 1991 election. Accordingly, the list of respondents shown in the petition should reflect that Robert C. Lanier has replaced Kathryn Whitmire as Mayor and that Gracie Saenz, Judson Robinson III, and Helen Huey have replaced Beverly Clark, Margarette Robinson, and Larry McKaskle as members of the city council.

Throughout this brief in opposition respondents will be referred to collectively as "the City."

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JESSE CAMPOS, *ET AL.*,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the Petition For Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Fifth Circuit entered in *Jesse Campos, et al. v. The City of Houston, et al.*, 968 F.2d 446 (5th Cir. 1992).

OPINIONS BELOW

Respondents rely upon Petitioners' recitation of the opinions below.

JURISDICTION

Respondents agree with petitioners that jurisdiction, if it exists, is under 28 U.S.C. § 1254(1). As discussed in more detail below in the "Reasons to Deny the Petition," it is the City's position that no jurisdiction exists under article III to consider this petition since the petitioners seek nothing more than an advisory opinion and since there is no longer any relief that can be granted as a result of an appellate decision.

STATEMENT OF THE CASE

The statement of facts presented in the petition for certiorari is materially incomplete. Although the thrust of the petitioners' argument is that the City of Houston engaged in "political machinations" designed to "undermine" the Voting Rights Act, *see* Petition at 2, they omit critical facts that are inconsistent with their allegation.[1]

[1] Although petitioners suggest that the issues in this case arise from an improper motive on the part of the City to undermine the Voting Rights Act, the courts that have previously reviewed this case have consistently declined to accept petitioners' interpretation of the facts. *E.g., Campos v. City of Houston*, ___ U.S. ___, 112 S.Ct. 354 (1991) (Scalia, J., in chambers) ("no reason to believe the City was acting in bad faith in the sense of seeking to frustrate the purposes of the Voting Rights Act."); *Campos v. City of Houston*, 968 F.2d 446, 450 and 451 (5th Cir. 1992) ("Under the circumstances, we cannot say that the course chosen by the City necessarily was either improper or taken in bad faith, nor did the City's lawsuit prevent the Attorney General from proceeding to consider preclearance matters."; " . . . the City did not seek relief that necessarily would circumvent preclearance requirements.

Most significantly, even though the petitioners claim that the City engaged in a subterfuge designed to have the district court reinstate the redistricting plan that had been objected to by the Attorney General, they fail to inform this Court of the most relevant fact of all – *i.e.*, that the City specifically requested that the district court not order use of the objected-to plan, but rather that it approve an alternative plan that had been crafted to cure the Attorney General's objection. The City, accordingly, believes it is necessary to expand significantly on the statement of the case found in the petition.

Redistricting Background

This case arises from the redistricting of the Houston city council to reflect population changes shown in the 1990 census. The petition, which is brought on behalf of several Hispanic citizens of Houston, correctly reflects the percentage of Hispanic population in the City of Houston, but it is important to be aware of the complete racial and ethnic composition of the City and the impact of the council structure and configuration on all groups protected by the Voting Rights Act. The City's composition is:

African-American	27.5%
Hispanic	27.6%

Instead, the City sought to alleviate the difficult situation it faced after the electorate had rejected the sixteen single-member district plan and the Attorney General had objected to Plan 9-5-1 #2."); *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. Aug. 21, 1992) (3-judge ct.) slip op. at 8, n.6 ("There is no record of bad faith by the City . . . . ").

Asian	3.9%
Anglo/other	40.6%

After the 1990 federal census was released, the City conducted an extensive redistricting process with 13 public hearings. The process was designed to encompass not only the narrow issue of how council district boundaries should be drawn but also to consider whether the 9-5-1 structure[2] of the council should be changed in order to provide greater electoral opportunities to groups protected by the Voting Rights Act. A major factor in the redistricting analysis was the striking difference between Hispanic and African-American representation on the Council. Although both groups have virtually identical percentages of the City's population, at the time of the redistricting hearing, African-Americans held five of the 14 council seats, while Hispanics held only one. In particular, African-Americans held three of the five at-large seats, while at that time no Hispanic had been elected to an at-large council position.[3]

Representatives of the two minority groups had differing views on what council structure was preferred. Hispanic witnesses generally favored an expansion of the council to increase the number of single-member districts since a larger number of districts would produce districts with smaller populations, which in turn would make it

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[2] There are nine single-member council districts, five at-large council positions, and a mayor who is also elected at-large.

[3] At the election held in November 1991, an Hispanic was elected to an at-large council seat formerly held by an African-American. Thus, the council now has two Hispanics (one elected from a district and one elected at-large) and four African-Americans (two elected from districts and two elected at-large).

possible to draw more districts with Hispanic majorities. Hispanic witnesses also preferred the elimination of the at-large seats. As African-Americans had been very successful in being elected to the at-large positions, African-American witnesses tended to favor retention of the at-large seats.

In an attempt to accommodate the views of both groups, the City determined that the structure of the council should be expanded to a 16-6-1 configuration.[4] This option would produce the number of single-member districts sought by Hispanic witnesses while retaining the at-large component that had produced the election of several African-American members of the council. This alteration of the council structure, however, required amendment of the city charter which can be accomplished only by a vote of the people. *See* Tex. Const., art. XI, § 5; Tex. Loc. Gov't Code, § 26.044 (Vernon Supp. 1992). Thus, on June 5, 1991, the City adopted two sets of district boundaries. A sixteen-district plan was adopted to be effective if the voters approved the 16-6-1 option in an election to be held on August 10, 1991. Additionally, a nine-district plan was approved[5] to be effective only if the 16-6-1 referendum was not passed.

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[4] Sixteen single-member council districts, six at-large council positions, and a mayor elected at-large.

[5] Under the terminology adopted by the district court in *Campos v. City of Houston*, this 9-5-1 plan became known as Plan 2. The terminology adopted by the district court and used in the Fifth Circuit, in the petition, and in this brief in opposition is:

> **Plan 1** – the preexisting plan that had been drawn on the basis of the 1980 census.

The City's 9-5-1 Options

In determining the configuration of the nine single-member districts in the 9-5-1 plan, the city council had to decide whether it was preferable to adopt a plan with only one, but a presumably safe, Hispanic district or to choose a plan with two Hispanic districts, although both might be marginal.[6] There was no clear answer as to which option would better comply with the purposes of the Voting Rights Act and, in particular, with the goal of assuring equal electoral opportunity for Hispanic voters. Testimony by Hispanic witnesses at the public hearings had consistently indicated that only one Hispanic district could be drawn in any nine-district plan.[7]

Plan 2 – the plan adopted on June 5, 1991, and objected to by the Attorney General on October 4, 1991. This plan included one strong, predominantly Hispanic district, and was the one ordered for use as an interim plan by the district court.

Plan 3 – the plan adopted on October 11, 1991, in response to the Attorney General's objection and precleared the next day. This plan had two predominantly Hispanic districts, but the Hispanic majorities were more marginal than in Plan 2.

[6] This is apparent from an examination of the plan that was ultimately adopted with two predominantly Hispanic districts. In that plan Hispanics constituted 50.5% of the voting age population in one district, but only 27.3% of the district's registered voters.

[7] The testimony was offered in the context of whether the size of the council should be increased. The testimony essentially was that a larger council was required since a nine-district structure did not offer the option of drawing two Hispanic districts.

Additionally, on May 6, 1991, which was one week before the council was to select a plan to present for public comment, the Department of Justice objected to proposed Dallas city council districts as having Hispanic voting age populations that were too low to assure the opportunity to elect a candidate of Hispanic choice. The Dallas districts that were rejected by the Department as being too weak were stronger, in some respects, than could be created in Houston under the two-Hispanic-district option. Accordingly, the City of Houston chose to proceed with the option containing one strong Hispanic district rather than an option containing two districts with potentially tenuous Hispanic majorities.

Attorney General's Review

The two alternative plans (*i.e.*, the 16-6-1 plan and the 9-5-1 plan containing one predominantly Hispanic district) were submitted to the Attorney General of the United States on July 8, 1991, for his review under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The City's submission letter requested expedited consideration and pointed out that candidate filing was required by state law to begin August 21, 1991, and close on September 23, 1991, and that the election was scheduled for November 5, 1991.

On August 10, 1991, the 16-6-1 proposal was defeated by the voters. This left the 9-5-1 Plan 2 as the operative plan. On August 21, 1991, the day candidate filing was required by law to begin, the Attorney General requested additional information from the City. That information

was provided on August 29, 1991.[8] The effect of this request for additional information was to give the Attorney General an additional 60 days to review the submission. 28 C.F.R. § 51.37(c). The City notified the Attorney General that if any changes in the redistricting plan were to be required as a result of the Attorney General's review, it would be necessary to know by September 15 so that necessary alterations could be made prior to the statutorily imposed September 23 filing deadline. On Friday, October 4, 1991, at approximately 6:00 p.m., the Attorney General imposed an objection to the 9-5-1 plan as he essentially concluded that the City should have chosen a plan that contained two districts with Hispanic majorities.

Throughout this and the collateral three-judge court litigation, *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex.) (3-

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[8] The Fifth Circuit stated and the petitioners allege that the City's submission was not complete until September 27, 1991. Petition at 3; *Campos v. City of Houston*, 968 F.2d 446, 448-449 (5th Cir. 1992) (Petition at A-4). As is typical during the review of major submissions, the Department asked several questions during the process and gave the City the opportunity to respond to allegations made by persons opposing preclearance. The last response to this type of inquiry was on September 27, 1991, and to that extent, the submission was complete on that date. Under the regulations promulgated by the Attorney General, however, the submission was complete for the purpose of measuring the time limits for the Attorney General's review on August 29, 1991, when the City responded to the Attorney General's request for additional information. 28 C.F.R, § 51.37(c). While the City attempted to obtain an earlier determination by the Attorney General, it does not contend that the decision was outside the time limits provided by law.

judge court), the City and the Department of Justice have disagreed regarding the facts relating to the timeliness of the City's submission and of the Attorney General's review. To the extent that those facts have current relevance, they were summarized by the three-judge court when it said:

> There is no record of bad faith by the City, and the Justice Department's tardiness indicates no more than bureaucratic inertia. Redistricting to accomodate the then-controversial 1990 census results was difficult for all parties to the process. Assessing blame might have been relevant as part of the balancing of equities *prior to* the election (cf. order of Scalia, J., ___ U.S.L.W. ___ [)], but it serves no point at this late date.

United States v. City of Houston, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. August 21, 1992) slip op. at 8 n.6 (emphasis in original).[9] The City's basic point is not to assess blame but rather is to make it clear that the timing of the objection, no matter whose fault it was, put the City in a difficult position and limited the available courses of action.

The City's Options and Response Regarding the November 1991 Election

Due to the timing of the objection, the City had no good options. It did not have authority under state law to

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[9] The reference in the quotation to the order by Justice Scalia is to his opinion on October 29, 1991, denying the application for injunction and stay in this case. ___ U.S. ___; 112 S.Ct. 354 (1991).

halt the election. In light of the Attorney General's objection, it could not continue to conduct the election on the basis of Plan 2. The pre-1991 districts (Plan 1) were reinstated by virtue of the objection, but these districts were malapportioned and, in any event, could be used only if candidate filing were reopened and early balloting were delayed. The City, however, had no authority under state law either to reopen filing or to change the election schedule. Thus, no matter what course the City chose, it was necessary for it to seek judicial intervention to obtain authority either to stop the election or to proceed.

On Monday morning, October 7, 1991, the City filed its counterclaim in *Campos v. City of Houston*, S.D. Tex. (No. H-91-885). The plaintiffs in that case, who are petitioners here, purported to represent the class of all Hispanic voters in the City of Houston[10] and had challenged the 9-5-1 structure of the city council pursuant to section 2 of the Voting Rights Act. 42 U.S.C. § 1973. The City alleged in its counterclaim that it could not proceed with the election using Plan 2, yet its previously adopted plan, Plan 1, was malapportioned under one-person/one-vote principles. The City asked the court to declare the status of Plan 1 and, if appropriate, to enter an order establishing an interim plan that would permit the City to conduct the election on schedule. Since Plan 2 was the only plan in existence at the time the suit was filed that was based on the 1990 census, was not retrogressive when compared to Plan 1 which was based on the 1980 census, and was in

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[10] Several months after issuance of the district court decision that is being challenged here, the petitioners withdrew their request for class certification.

compliance with equal population requirements of the Constitution, the City asked that it be considered for use as the interim plan for the November 1991 election even though it had been the subject of an objection.[11]

The City, however, had already initiated efforts to create another option that would address and resolve the Attorney General's objection. At the evidentiary hearing on Wednesday, October 9, the City informed the district court of these efforts and expressly asked the court to defer decision for at least one day in the hope that the City would be able to develop an agreed plan that would be acceptable to the Hispanic plaintiffs and that would resolve the Attorney General's concerns. On Thursday, October 10, 1991, the City amended its counterclaim to drop the request that Plan 2 be ordered and instead asked only that the district court adopt an unspecified "interim plan." The court was advised at its hearing the next day that this amendment was made for the specific purpose of conforming the pleadings to the City's request that a new plan, rather than Plan 2, be ordered for interim use.

The City was unable to reach an agreement with the plaintiffs.[12] Nevertheless, on Friday morning, October 11,

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[11] The Department of Justice was not named as a party to the litigation. The City, however, informed the Department over the weekend of its intent to file suit on Monday and provided the Department with a copy of the counterclaim as soon as it was filed. The Department chose to participate as an amicus rather than as an intervenor.

[12] The plaintiffs were willing to agree to a 9-5-1 interim plan only if it was coupled with an agreement to change the structure of the city council from 9-5-1 to sixteen single member districts. The City of Houston is not empowered to change its

1991, the council adopted a new plan (Plan 3) designed to respond to the Attorney General's objection. The new plan, along with an election schedule for reopening filing and postponing the start of early balloting was submitted to the Attorney General for preclearance under section 5 of the Voting Rights Act at approximately 12:30 p.m. that same day and was simultaneously submitted to the district court with a request that the court order it, rather than the objected-to Plan 2, as the interim plan. Although the City expressly urged the adoption of Plan 3, which was the plan that was designed to cure the Department of Justice objection, it emphasized that the choice of the interim plan to be used ultimately rested with the court. The Hispanic plaintiffs opposed adoption of *any* nine district plan for use in the November 5, 1991 election and, therefore, objected to the use of Plan 3.

In order to consider the City's request regarding Plan 3, the district court postponed its decision until 1:30 p.m. the next day, Saturday, October 12. Approximately two hours before the court was scheduled to rule, the Attorney General indicated that he did not object to Plan 3. Nevertheless, the district court ordered that the November 5, 1991, election proceed on the basis of Plan 2.

Pursuant to the district court's October 12, 1991, order, the election process began. As indicated in more detail in the statement of the case contained in the

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election structure without a charter amendment approved by the voters of the City. *See Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984).

petition, there were numerous, unsuccessful efforts to stay or enjoin the election.

Post-election events

After the November 1991 election and the appeal of the order permitting that election to proceed, there were at least two relevant occurences. First, the three-judge court considered the motion of the United States to invalidate the results of the November 1991 election and to order that new elections be held. The court expressly denied the motion and dismissed the case. *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. August 21, 1992) (3-judge court). No appeal was taken by any party. As the disposition of the three-judge court case relates to the ability of this Court to grant any relief in response to the petition, a copy of that Court's opinion and judgment is reprinted as an Appendix.

Second, the City and the petitioners have entered into a settlement agreement, and the district court has abated the case until early 1994 pursuant to that agreement. While the settlement relates primarily to the original section 2 case in which the counterclaim that forms the basis for this petition for writ of certiorari was filed, portions of that settlement may be relevant to the consideration of the petition. Among the elements of the settlement are (1) an agreement that the November 1993 election will be conducted pursuant to a plan that is substantially similar to Plan 3 and that is submitted for preclearance under section 5 of the Voting Rights Act and (2) an agreement abating proceedings in the section 2 case

until after the voters have had an opportunity to consider a charter amendment in November 1993 that, if enacted, would create 16 single-member council districts.

REASONS TO DENY THE PETITION

I.

The Court is Without Jurisdiction to Entertain the Petition for Writ of Certiorari since the Petitioners Disagree Only With the Court of Appeals' Reasoning and Not With Its Decision

Although the petitioners are asking this Court to exercise its certiorari jurisdiction to review the decision of the Fifth Circuit, their quarrel is only with the reasoning of the court and not with its decision. Accordingly, this Court is without jurisdiction to hear their petition.

The petitioners appealed the decision of the district court ordering use of Plan 2 as an interim plan for the 1991 election. The Fifth Circuit agreed that the district court erred, and it accordingly vacated the district court order and remanded the case. Petitioners' complaint is not with the court of appeals' decision, but rather is with its rationale. Essentially, petitioners would have preferred the court of appeals to have based its decision on a broader jurisdictional theory instead of an abuse of discretion analysis.

While this Court does not appear to have written on the issue in cases arising under its certiorari jurisdiction, in appellate cases it has made it clear that it has no

jurisdiction to entertain appeals from a party who is satisfied with the lower court's disposition of the case. *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383, 390 n.5 (1970); *Public Service Commission v. Brashear Freight Lines*, 306 U.S. 204, 206-207 (1939); *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934); *New York Telephone Co. v. Maltbie*, 291 U.S. 645, 646 (1934). Presumably, the absence of decisions relating to this type of case arising under the Court's certiorari jurisdiction is attributable both to the fact that very few people seek judicial review when their disagreement is with the lower court's rationale rather than its decision and to the likelihood that any such cases that might arise are disposed of through a summary denial of the petition. There is, however, no reason that the same jurisdictional and policy considerations present in the cases arising under the appellate jurisdiction of this Court would not apply equally to those arising under the certiorari jurisdiction.

A narrow exception to the general rule has been recognized where a party obtains a generally favorable decision from the lower court but retains a personal stake in a collateral issue that is sufficient to satisfy the requirements of article III. *E.g., Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334 (1980). That is not, however, the case here as the petitioners' complaint goes not to any collateral issue decided below but rather relates only to the rationale underlying the court of appeals decision. Merely complaining about the lower court's reasoning is not sufficient to establish the personal stake necessary to sustain an appeal. As Justice Scalia noted when he served as a circuit judge in a case in which the appellants complained that an FCC decision that defined the scope of the

agency's jurisdiction would have a practical and legal impact on them:

> All persons adversely affected by [a] rule would have standing to challenge its compliance with legal prescriptions designed for their protection. [citations omitted] The situation is different, however, when an interpretation of a statute, or some other legal principle, is set forth *as the rationale of an adjudication*. No one would contend that a person affected by no more than the precedential effect of a district court decision would have standing to appeal that decision here.

Radiofone, Inc. v. Federal Communications Commission, 759 F.2d 936, 938 (D.C. Cir. 1985) (emphasis in original). The rationale of the adjudication in the court of appeals is, of course, all that petitioners complain of here. That is not sufficient to invoke this Court's jurisdiction.

Finally, the petitioners have a difficult time maintaining that the court of appeals erred in using an abuse of discretion analysis since their brief in the Fifth Circuit invited the court of appeals to decide the case on precisely that basis. While the petitioners' primary argument was that the district court was without jurisdiction, they expressly raised the abuse of discretion claim as an alternative theory.[13] In short, the petitioners are asking this

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[13] The brief filed by the petitioners (appellants below) in the Fifth Circuit stated:

> Finally, even if jurisdiction exists, the district court abused its authority in granting the injunctive relief ordering a plan which has been voided by the Section 5 process into effect.

– page 12

Court to reverse the court of appeals for doing what the petitioners asked.

II.

Any Relief That Could be Granted in Response to This Petition is Barred Either by Mootness or the Final Judgment of the Three-Judge Court

The district court order that was considered by the court of appeals and is now the subject of this petition was interim in nature and related only to the November 5, 1991, election. Specifically, it enjoined the City from using Plan 1 for the November 1991 election and then ordered that

> (2) 9-5-1 plan #2 is to be utilized as an interim plan to enable the November 5, 1991 elections to proceed. Those persons elected in the November 5, 1991 City Council election shall hold office until their successors are elected under a permanent apportionment plan (9-5-1 plan #3 or otherwise) which complies with the Voting Rights Act and the United States Constitution.

Campos v. City of Houston, 776 F. Supp. 304, 308 (S.D. Tex. 1991) (Petition at A-27).

The November 1991 elections have now occurred. Relief in the form of preventing that election is now obviously impossible. To the extent that the petitioners

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> Any application of the tests set down in [*Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974)] makes it clear that the district court abused its discretion.
>
> – page 28

may be concerned about the November 1993 election, the district court order did not affect that future election other than requiring that any plan used in that election comply with the Voting Rights Act. Further, the petitioners and the City have already agreed in a settlement agreement in this case that the 1993 elections will be held under a plan that will be substantially similar to Plan 3 and that will be submitted for preclearance.

The only possible effect a decision in this case could now have would be to invalidate the 1991 elections and cut short the two-year terms of the councilmembers elected at that time. No party, however, is seeking that relief. In fact, both the petitioners and the City have represented to the district court that they are not seeking to hold a new election prior to the next regularly scheduled election in November 1993.[14] Further, an order to require new elections was sought by the United States in the three-judge court case, in which both the petitioners and the City were parties. That court expressly declined to require special elections and dismissed the case. The time for any appeal of that judgment to this Court has now passed. *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex.

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[14] At the June 4, 1992, hearing in the district court, the following exchanges occurred:

> THE COURT: Do you want a special election?
>
> MR. REYES (counsel for plaintiffs/petitioners): No, Your Honor. . . .
>
> THE COURT: Does the city want a special election?
>
> MR. HEATH (counsel for the City): No, Your Honor.

– page 4

August 21, 1992) (3-judge court), reprinted *infra* as an Appendix. Both the City and the petitioners are bound by that judgment.

Thus, the only relief that petitioners could have received in this case is either enjoining the election from occurring in the first place or invalidating it and requiring that a new election be held. The possibility of preventing the election became moot as soon as the election was held on November 5, 1991. The possibility of invalidating the 1991 election and requiring that a new election be held is not relief that is sought by either party and, indeed, both parties are now precluded from doing so by final judgment in the three-judge court.

In short, the petition does not raise any claim for which this Court can grant relief; it asks merely for an advisory opinion on the validity of the rationale used by the Fifth Circuit to reach its decision. That is not sufficient to confer jurisdiction on the Court. *Montana v. Imlay*, ___ U.S. ___, 61 USLW 4001 (Nov. 3, 1992); *see generally Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992).

III.

The Issue Presented in the Petition is Unlikely to Reoccur

It is not at all unusual for federal district courts to be requested to order use of an interim redistricting plan when an election is imminent and the existing district boundaries are legally defective. The situation presented in this case, however, is relatively unique and unlikely to reoccur for at least two reasons. First, the factual and procedural context that presents the question arises

because of the interaction between the timing of the Attorney General's section 5 objection and the petitioners' tactical decision to use that objection as leverage to obtain a favorable resolution of non-section 5 issues. It is not likely that this particular confluence of circumstances will occur again. Second, even if the situation should present itself again, the Fifth Circuit opinion makes it abundantly clear that a district court should rarely, if ever, order use of an unprecleared plan when a precleared plan is available.

A. The case arises out of a highly unusual situation created by the interaction between the timing of the Attorney General's objection and the petitioners' opposition to any plan that the City had legal authority to adopt.

The objection that gave rise to this dispute was made eleven days after the statutory deadline for candidates to file to run for office. Because of the timing of the objection the City was unable to address and resolve the Attorney General's concerns on its own initiative. The City was precluded by state law from altering the election schedule, which would have been necessary if it was to utilize a different plan, and it was precluded by the Voting Rights Act from proceeding with the objected-to Plan 2. Accordingly, the City's only viable option was for it to invoke the jurisdiction of the district court and to ask the court to order the use of an interim plan.

The receipt of an objection shortly before a scheduled election and the decision to ask a district court to enter an interim plan in such situations are not atypical. *E.g.*, *Upham v. Seamon*, 456 U.S. 37 (1982); *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (3-judge ct.), *vacated and*

remanded for reconsideration in light of amendments to Voting Rights Act, 461 U.S. 921 (1983); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), *application for stay denied*, 456 U.S. 902 (1982). Normally, though, the parties have a joint interest in seeking interim relief to permit the election to go forward even though they may, and frequently do, have significant disagreements about the details of the plan that should be adopted. Here, however, the petitioners opposed the use of any interim plan based on the 9-5-1 council structure. Essentially, the petitioners made a tactical decision to use the Attorney General's section 5 objection as a means of holding the November 1991 election hostage in an effort to obtain a favorable resolution of their section 2 claim. While that may have been a reasonable decision for petitioners to make in the specific context of this litigation, it is not one that should be expected to be repeated frequently. Thus, it is unlikely that this specific procedural posture will reoccur, and the issue is accordingly not one that should be of broad application.

B. The Fifth Circuit opinion makes it unlikely that another district court would choose an objected-to plan as an interim remedy when a precleared plan was available.

The petitioners complain that the Fifth Circuit analyzed this case under abuse of discretion standards and did not hold, as a matter of law, that no election could be held under an interim plan to which the Attorney General had objected when a precleared plan was available. While it is conceivable that a court facing a similar situation could adopt an objected-to plan in lieu of a precleared one, it is hardly likely. The opinion below

makes it clear that the precleared plan is the one to be favored and that the district court will face a very heavy burden to justify its rejection. Failure to adopt the precleared plan will likely be an abuse of discretion just as it was found to be here. Given the Fifth Circuit opinion it is highly unlikely that other district courts will make the choice that petitioners ask this Court to foreclose.

IV.

There is No Important Question of Federal Law as the Opinion Below is Entirely Consistent with the Settled Law

This case does not present any issue of conflict among the courts of appeal. There is no divergence of authority that must be resolved by this Court. In fact, the case is one of first – and given the unusual circumstances under which it arose, perhaps one of last – impression.

An examination of the three arguments advanced by petitioners for granting the petition shows that none demonstrates any departure from established law and none raises an important issue that requires resolution by this Court.

A. The case does not raise questions involving the scope of section 5 coverage.

The petitioners essentially contend that the procedure followed by the City was a subterfuge to circumvent the requirements of section 5 of the Voting Rights Act and that the case could be brought only pursuant to section 5 and only in the United States District Court in the District of Columbia. *See* 42 U.S.C. § 1973c. This

contention, however, is not supported either by the factual posture of the case or by the established law.

First, the City's lawsuit did not ask that the Attorney General's section 5 decision be reviewed. The City recognized that the objection made Plan 2 invalid and that it could be used, if at all, only on a temporary basis in response to exigent circumstances. There was never any question that a new permanent plan would have to be adopted and approved under section 5.

Second, as the petitioners recognize, the legal effect of the Attorney General's objection to Plan 2 was to reinstate Plan 1, which was based on ten-year old census data and posed serious one person/one vote questions. The City's lawsuit related to the validity of Plan 1, not to the merits of the Attorney General's objection. While the petitioners would have had the City bring that suit in a section 5 action in the District of Columbia, the basic issue posed by the suit, *i.e.*, the validity of Plan 1 under one person/one vote standards, is not a section 5 question and is not required to be resolved by a three-judge court. 42 U.S.C. § 1973c; *see United States v. Board of Supervisors*, 429 U.S. 643, 646-47 & n.3 (1977).

The petitioners' rationale for urging that the suit be brought in the District of Columbia is the implicit argument that the City's counterclaim was not a one person/one vote case, but instead was an attack on the Attorney General's objection. This argument ignores the limited nature of the City's pleadings, ignores the very real difficulties faced by the City because of the timing of the objection, ignores the interim nature of the relief sought, and ignores the City's express request that the district court implement the plan (Plan 3) that addressed and

resolved the Attorney General's objection. Further, not only was no section 5 issue presented on the face of the pleadings,[15] there was no certainty that any section 5 issue would arise in the resolution of the suit. Even if one assumes that the district court would find that Plan 1 was invalid and also assumes that the court would grant interim relief, it is entirely possible that it would order that the election be held under Plan 1, notwithstanding its constitutional infirmity, or that it be held under Plan 3. Indeed, the petitioners expressly admit as much.[16] If the district court had ordered the use of either Plan 1 or Plan 3, there would have been no section 5 issue, since both plans had been precleared. This clearly illustrates the flaw in petitioners' legal analysis. Under their theory, there would have been jurisdiction for certain forms of relief, but not others. As the Fifth Circuit noted, the petitioners' argument fails because "it would make *jurisdiction* depend upon the relief ultimately ordered by the court." *Campos v. City of Houston*, 968 F.2d at 451 (Petition, A-11 thru A-12).

Third, one cannot decide the issue outside the factual and procedural context in which the case was presented.

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[15] Even if the original counterclaim could be viewed as raising a section 5 issue since it asked that Plan 2 be used as an interim plan, that possible interpretation of the pleadings evaporated when the counterclaim was amended to omit the references to Plan 2 in anticipation of the City's request that Plan 3 be adopted.

[16] "If the district court felt that it did not have time to order plan #3 into effect, it could have ordered the election to take place under the malapportioned plan #1 under its emergency power exercised in one-person, one-vote cases."

Petition at 20

The critical fact, which is omitted from the petitioners' argument and their description of the case, is that the City expressly asked the district court to order use of Plan 3.[17] The petitioners ask this Court to decide whether a governmental body should be permitted to engage in machinations to undermine the purposes of the Voting Rights Act by using the judicial process to reinstate a plan (*i.e.*, Plan 2) that has been disapproved by the Attorney General. That issue is, of course, not properly presented for decision by this case since the City asked that Plan 3, rather than Plan 2, be adopted.

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[17] The City's request is apparent from the following exchange between the district court and the City's attorney:

> THE COURT: Are you asking that [Plan 2] be adopted as the interim plan?
>
> MR. BICKERSTAFF: No, sir. Our request is that the Court adopt the plan, which the council has approved and adopted on this date [i.e., Plan 3], which addresses the objections in an effort to increase the opportunity for Hispanic representation.
>
> . . .
>
> The reason we are urging the plan which was adopted today, the third plan, is that that plan is designed to address the objections that were raised by the Department of Justice.

Statement of Facts (October 11, 1991) at 26-27. The Fifth Circuit recognized this fact in formulating its opinion as it said:

> At the hearing [on October 11] . . . the City urged the court to adopt Plan 9-5-1 #3 as an interim plan pending preclearance.

Campos v. City of Houston, 968 F.2d 446, 449 (5th Cir. 1992) (Petition, A-5).

B. The district court had clear jurisdiction over the City's counterclaim.

The petitioners claim that the City had no case or controversy to litigate with them since the petitioners did not implement Plan 1 which was the subject of the counterclaim. Clearly, however, the petitioners could have raised the issue in a suit against the City. Given that circumstance, the law is well established that the City could seek a declaratory judgment by bringing suit against persons who would typically be plaintiffs. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273-274 (1941); *see Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 248 (1952).

Further, it is hardly correct to urge, as petitioners do in their petition filed with this Court, that the City had no reasonable basis to believe that it would be subject to a suit raising the one person/one vote issue. When a redistricting plan is disapproved, resulting in the reinstatement of a prior plan based on an out-of-date census, the typical strategy is to challenge the malapportionment of the reinstated plan. *See, e.g., Terrazas, supra*, 537 F. Supp at 518; *Seamon v. Upham*, 536 F. Supp. 931, 937 (E.D. Tex. 1982) (3-judge ct), *affirmed sub nom., Upham v. Seamon, supra*. Additionally, in discussing the City's alleged lack of any reason to believe that it would be subject to a one person/one vote suit, petitioners fail to mention that their counsel, on behalf of different individuals who were part of the plaintiff class alleged in *Campos*, had amended a suit only three and one-half months earlier to bring just such a one person/one vote suit challenge against Plan 1. *Mena v. Mosbacher*, Civ. No. B-91-018 (S.D. Tex.), Second

Amended Complaint at ¶¶ 102-110.[18] The Fifth Circuit was undoubtedly correct when it concluded that had the City proceeded with Plan 1, as petitioners suggest it should have, "it faced the very substantial likelihood of an injunctive challenge and postponement of the election, or later vacation of the election results." *Campos v. City of Houston*, 968 F.2d at 450 (Petition at A-8).

Also, the petitioners make a policy argument that the effect of bringing this suit rather than a section 5 suit is to permit the City to avoid litigating against the Attorney General with his attendant resources and prestige. Petition at 16. Once again, the facts of this case do not support the claim that petitioners seek to present to this Court. The City kept the Department of Justice informed of its intentions and its actions. The Attorney General chose to be an amicus and participated fully in the litigation at every level. Furthermore, the Attorney General brought a separate section 5 enforcement action against the City in a three-judge district court. The suggestion that the course followed by the City is a means of circumventing the participation of the Attorney General is simply not borne out by the facts.

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[18] The *Mena* litigation was pending in Brownsville, Texas, and raised a panoply of redistricting issues against numerous defendants including the Secretary of Commerce, the Director of the Census, Texas state officials, the class of all 254 Texas counties, the Corpus Christi Independent School District, and the cities of Corpus Christi and Houston. The plaintiffs in *Mena* purported to represent a class, although the exact nature of the class was ambiguous and apparently narrower than the class alleged by the *Campos* plaintiffs. Clearly, though, the individuals in the *Mena* suit fell within the class that the *Campos* plaintiffs purported to represent.

C. The petitioners raise no valid claim against the court of appeals' decision that the district court abused its discretion in adopting an unprecleared plan when a precleared plan was available.

As discussed in more detail above, the court of appeals made the ruling that the petitioners requested, *i.e.*, that the district court erred in adopting the objected-to Plan 2 when a precleared plan was available. Accordingly, the claim raised in their petition to this Court does not present a case or controversy within this Court's jurisdiction.

The petitioners' concern is based on their belief that the court of appeals should have ruled that the district court had no jurisdiction to adopt Plan 2 rather than finding that it had abused its discretion in doing so. Even if this claim were properly brought, it would not present an issue that merits an exercise of this Court's discretionary jurisdiction.

First, this Court has recently suggested that there may be circumstances that would justify the use of an unprecleared plan in emergencies. *Clark v. Roemer*, ___ U.S. ___, 111 S.Ct. 2096, 2102 (1991). Second, this Court has made it clear that the existence of an emergency, such as that caused by the pendency of an upcoming election, may justify the interim use of a plan that would "not in all respects measure up to the legal requirements, even constitutional requirements." *Upham v. Seamon*, 456 U.S. 37, 44 (1982).

The justification for refusing to tie the hands of the district courts so that they could never use an unprecleared plan when a precleared plan is available is

apparent from the following hypothetical situation. A governmental body draws a redistricting plan after publication of the 1990 census that contains two predominantly minority districts. This is a significant improvement over the preexisting plan that had been drawn using the 1980 census since that plan contained only one predominantly minority district. Nevertheless, the Attorney General objects since he believes that the entity harbored a discriminatory purpose in failing to produce and adopt a plan that would have resulted in a significant minority presence in a third district. When the issue of interim relief to permit the pending election to proceed is presented to the district court, there is no time to create a new proposal and the only plans in existence are the objected-to 1990 plan which contains two minority districts and the pre-existing 1980 plan which contains only one. The 1980 plan was, of course, precleared ten years earlier. If the petitioners' position were correct, the only plan that the district court could adopt would be the previously precleared 1980 plan even though, upon any comparison with the 1990 plan, it was clearly and significantly dilutive of minority voting rights. This Court has wisely avoided placing district courts in a strait jacket that would prevent them from responding to this type of inequity.

This Court's past reluctance to limit the discretion of the district courts has been entirely appropriate; now is not the time and, given the serious article III issues posed by the posture in which the petitioners bring the matter to this Court, this is not the case to rethink that issue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF HOUSTON, ET AL., Defendants.	§	No. 91-3076 (Consolidated)
JESSE CAMPOS, W.R. (RESENDEZ) MORRIS, AND MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON, v. CITY OF HOUSTON, ET AL., Defendants.	§	No. 91-3117

MEMORANDUM OPINION ON MOTION OF UNITED STATES FOR ENTRY OF ORDER REQUIRING SPECIAL ELECTIONS

(Filed AUG 21 1992)

Before JONES, Circuit Judge, DeANDA, Chief District Judge and LAKE, District Judge.

EDITH H. JONES, Circuit Judge:

Having considered the parties' arguments and the uncontested facts adduced, this three-judge court determines that it is neither appropriate to void the results of Houston's 1991 City Council elections for nine single-

member districts[1] and order a special interim election to be conducted, nor is it proper to bow to the City's request that we retain jurisdiction to order relief in its favor. Recent developments, particularly the proposed settlement of the related case filed under § 2 of the Voting Rights Act against the City, militate against requiring an interim election. Additional background to this case is recited in our previous opinion and in other reported decisions.[2]

I. SCOPE OF THIS COURT'S AUTHORITY

The Supreme Court has described the limits of this court's jurisdiction. We are to determine whether a particular voting or election practice is required to be precleared by the Justice Department under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, whether the local authority obtained preclearance from the U.S. District Court for the District of Columbia or the Attorney General before the election was held, and if not, what remedy may be ordered. *See, e.g., City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). That Houston's 1991 city

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[1] The United States, acting through the Justice Department, does not assert that the elections for mayor or the five at-large city council positions should be overturned.

[2] *Campos v. City of Houston*, 776 F. Supp. 304 (S.D. Tex. 1991), stay denied, *Campos v. City of Houston*, 112 S. Ct. 354 (U.S. 1991) and vacated, *Campos v. City of Houston*, 960 F.2d 26 (5th Cir. Tex. 1992), reh'g, en banc, denied, *Campos v. City of Houston*, 1992 U.S. App. LEXIS 13949, op. withdrawn, substituted op., *Campos v. City of Houston*, 1992 U.S. App. LEXIS 17452 (5th Cir. 1992); *United States v. City of Houston et al.*, No. 91-3076, 91-3117 (S.D. Tex 1991).

council election took place under a districting plan that was required to be but was denied preclearance by the Justice Department is not here disputed.

When the Supreme Court has considered remedies for violations of section 5 after elections had taken place under non-precleared practices, it has always left the final remedial decision in the hands of the trial court. *Allen v. State Bd. of Elections*, 393 U.S. 544, 563, 89 S. Ct. 817, 830 (1969); *Perkins v. Matthews*, 400 U.S. 379, 91 S. Ct. 431, 440-41 (1971); *Berry v. Doles*, 438 U.S. 190, 98 S. Ct. 2692, 2694 (1978); *Hathorn v. Lovorn*, 457 U.S. 255, 102 S. Ct. 2421, 2430-31 (1982); *N.A.A.C.P. v. Hampton County Election Comm.*, 470 U.S. 166, 105 S. Ct. 1128, 1137-38 (1985). This was also true in *N.A.A.C.P.*, the one case in which the Court suggested that if after-the-fact preclearance of a voting change was not obtained, the ordering of a new election might be an appropriate remedy. 105 S. Ct. at 1138 n.36. In no case has a *presumptive* remedy of voiding the election been endorsed by more than two members of the Court. *See Berry, supra*, 98 S. Ct. at 2694-95, (Brennan, Marshall, JJ). The United States relies upon *Clark v. Roemer*, ___ U.S. ___, 111 S. Ct. 2096 (1991), but as that opinion states, it does not discuss "the *ex post* question whether to set aside illegal elections."[3]

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[3] The Supreme Court held in *Clark* that a three-judge court abused its discretion by failing to enjoin *ex ante* the conduct of elections for non-precleared judicial posts. However, Louisiana state authorities had been on notice of a challenge to non-precleared judicial districts for three years before the elections occurred. There is no equitable comparison between that case and this one, in which the City's attempted redistricting followed closely on the heels of the 1990 Census Report.

We therefore disagree with the contention of the Justice Department that ordering new elections is the "presumptively appropriate remedy" for the lack of preclearance of apportionment Plan #2 under which Houston's election took place.

Courts in our circuit have held that ordering new elections in the wake of a section 5 violation is a "drastic remedy" that should only be imposed when absolutely necessary to vindicate, establish or protect important voting rights. *United States v. Louisville Municipal Separate School District*, 557 F. Supp. 1168, 1172 (3-judge court, N.D. Miss. 1983) (on remand from the Supreme Court's decision in *Hathorn v. Lovorn, supra*). In *Cook v. Luckett*, the Fifth Circuit declined to void the results of a local election even though it reversed the district court's decision that had implemented an un-precleared districting plan proposed by private plaintiffs rather than a precleared legislative plan. 735 F.2d 912, 921 *et. seq.* (5th Cir. 1984). The court reiterated an earlier holding that elections will not be set aside absent " 'serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct . . . ' " 735 F.2d at 922 (quoting *Saxon v. Fielding*), 614 F.2d 78, 79 (5th Cir. 1980).

Two lower-court cases cited by the government to support its motion for a new election are distinguishable. In one of them, the court ordered a new election as a remedy for the impermissible conversion to staggered-term elections of county supervisors. *United States v. Onslow County*, 683 F. Supp. 1021 (E.D. N.C. 1988). Some such order was obviously the only means to change from staggered terms to concurrent terms. In the other case, officeholders were elected under an invalid system to

four-year terms. The court ordered new elections after two years. *United States v. Cohan*, 358 F. Supp. 1217 (S.D. Ga. 1973).[4]

Ordering new elections is a drastic remedy for reasons that should be obvious. When elections have been held – even under a voting scheme that does not technically comply with section 5 – the people have chosen their representatives. Neither the Justice Department nor this court should lightly overturn the peoples' choices. Second, as the cost of ordering new elections may be high relative to other public priorities, a jurisdiction forced into holding a special election has much less to spend on those other necessities. This cost should not be cavalierly brushed away by other branches of government, whether federal or judicial, that neither pay it nor impose the tax burden on which a remedy depends.

Further, the rationale for requiring new elections seems particularly weak where, as here, officeholders serve for only two years. Given the usual delays of litigation, ordering a special election would ordinarily result in

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[4] It is incorrect to suggest, as does the Justice Department, that a "very similar action" was presented in *Coalition to Preserve Houston v. Interim Bd. of Trustees*, 494 F. Supp. 738, 742 (S.D. Tex. 1980), aff'd and appeal dism'd, 450 U.S. 901 (1981).

In the *Coalition to Preserve Houston* case, the defendants, the trustees of the Westheimer Independent School District, had created a new political entity in direct violation of a Justice Department order. *Id.* at 740, with the demonstrated discriminatory intent of frustrating a busing decree. *See, Ross v. Houston Indep. Sch. Dist.*, 457 F. Supp. 18, 26 (S.D. Tex. 1977), aff'd in part, vacated in part, 583 F.2d 712 (5th Cir. 1978). None of these facts are present in this case.

the installation of the court-approved electoral scheme for only a few months before the regular election cycle begins. What benefit accrues to the public from this interference is dubious. A special election also tends to skew the process of candidate selection. Potential candidates must decide to run, and to change their personal and professional schedules dramatically, on much shorter notice than they would face in preparing for a regular election cycle, and they must make this decision in the face of two extraordinary obstacles. First, tremendous uncertainty inheres in the typical low turnouts at special elections. Second, a significant financial hurdle is imposed by the prospect of a candidate's financing not one but two electoral races in close proximity – those for the special election and the ensuing regular election.

In endorsing the rule that ordering new elections is a drastic remedy to be reserved for the most egregious cases, we do not foresee that such a rule will undermine compliance with section 5 preclearance procedures. Most public officeholders take just as seriously as does the Justice Department their responsibility to follow the Voting Rights Act. It is significant that notwithstanding consistent Supreme Court authority that places discretion in the trial court to fashion a remedy for section 5 violations, and notwithstanding the thousands of voting changes that are the subject of preclearance requests each year, only a handful of reported cases deal with a dispute over the appropriate remedy for section 5 violations after an election has taken place.

II. WHAT REMEDY IS APPROPRIATE IN THIS CASE

Like the courts in *Louisville* and *Cook*, we do not find here the "drastic circumstances" that require ordering a new election in Houston before the regular city elections in 1993. We discern no section 5 impediment to the settlement negotiated in the companion section 2 case. That settlement, reached in June between Hispanic plaintiffs and the City, provides that the voters of Houston will decide – again – whether to enact a 16-6-1 council configuration, or will vote in the 1993 city council elections in districts substantially similar to those contained in the previously precleared Plan #3 boundaries.[5] Because the settlement enforces an apportionment plan based on one that has mustered section 5 preclearance, we do not need to impose any additional remedy at this time.

These conclusions are based on an evaluation of the following equitable factors.

First, the 1991 city elections were, to put it mildly, not conducted without judicial scrutiny of the issue that confronts us here. The district court's choice of injunctive relief, although later overturned on appeal, was reviewed on an expedited basis by the Fifth Circuit, the Supreme Court and this court. As was stated in *Louisville*, "local . . . officials as well as the . . . electorate should have the right to rely upon prior judicial determinations

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[5] Plan #3 provides for five at-large districts, a mayor, and nine single member districts, in two of which Hispanic voting age population constitutes 58.14% and 50.50% of the population respectively. The city acknowledges that minor changes to the previous configuration of Plan #3 will require submission to the Justice Department for preclearance.

. . . unless there are compelling reasons to the contrary." 557 F. Supp. at 1172.

Second, there is no evidence that the city elections were infected by invidious discrimination or serious irregularities[6] or that minority votes were substantially diluted. In fact, a contrary evaluation seems more accurate: Black and Hispanic candidates were elected to at-large council posts, defeating opponents of other races in the process, and minority candidates succeeded in being elected to the "minority districts" extant under Plan #2. Houston's city council now includes two Hispanics, four Blacks, and eight Whites. The Justice Department's complaints ring hollow against these indicia of the vitality of minority electoral opportunities. The federal government's interest would have been far better served by a gracious acknowledgment of these results rather than by its rigid insistence upon obtaining immediate compliance with section 5.[7]

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[6] We decline the parties' requests to cast aspersions on either side for pre-election delays in the administrative preclearance process. There is no record of bad faith by the City, and the Justice Department's tardiness indicates no more than bureaucratic inertia. Redistricting to accommodate the then controversial 1990 census results was difficult for all parties to the process. Assessing blame might have been relevant as part of the balancing of equities *prior to* the election (cf. order of Scalia, J., ___ U.S.L.W. ___, but it serves no point at this late date.

[7] The Justice Department's staunch adherence to Plan #3, in the face of electoral reality as well as the goals of section 5, seems strange. The Justice Department refused to preclear Houston's Plan #2 because it contains only one "safe" Hispanic district. Plan #3 was fashioned with a bare majority of voting-age Hispanics in two districts.

Third, salient facts were ignored by the Justice Department's submissions that, from the Hispanic voters' perspective, argue against holding a special election. City council term limits were approved by the voters in November 1991; in any succeeding city election there will be a significant turnover of the council's membership, wiping out the advantages of incumbency that might otherwise dilute minority opportunities. Because Plan #3 as precleared by the Justice Department provides for one of the two potential "Hispanic" council districts in which Hispanics comprise only 27% of the registered voter population and 50.50% voting age population, a voter registration drive would be necessary to assure optimal Hispanic participation. Such a drive would be hard to mount concurrently with the expedited election schedule sought by the Justice Department. The federal government's eagerness to press a premature election date, far from vindicating Hispanic voters' role in the electoral process, could undermine their role simply to preserve the Justice Department's section 5 preclearance rights.

Fourth, the Justice Department's request is essentially a collateral attack upon the settlement that the City

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The Justice Department's assertion here seems to be that while plan #2 created one safe Hispanic district, it was less desirable than plan #3 which created two marginal Hispanic districts. This position assumes that the legal standard in section 5 cases is to maximize minority representation. This is an incorrect statement of law. The correct standard for section 5 preclearance cases is, in the words of the Supreme Court in *Beer v. United States*, 425 U.S. 130, 141 (1976) and *City of Lockhart v. United States*, 460 U.S. 125, 133, 134 n.10 (1983), to prevent "retrogression".

has reached with Hispanic plaintiffs in the pending section 2 voting rights action. To the extent the Justice Department contends that the section 2 court "lacked jurisdiction" to order the city elections to go forward in November 1991, its argument has been refuted by the revised Fifth Circuit opinion in the case. *See Campos v. City of Houston*, opinion on rehearing, ___ F.2d ___, 1992 WL 180267 (5th Cir. 1992). Because the district court had jurisdiction to order some relief before the 1991 elections, and because it maintains jurisdiction to approve a settlement that complies with the Voting Rights Act, it would be most unseemly for this coordinate court, by ordering a new election, to grant the kind of relief that the Fifth Circuit refused. This is not to say that we, as a three-judge court, lack jurisdiction to grant the relief sought by the United States. Rather, we conclude that it would be an unwise exercise of our discretion to interfere with the settlement of a bona fide, hotly contested section 2 case, which has been predicated upon the implementation of nearly the same redistricting plan that the Justice Department precleared.

III. CONCLUSION

Although Houston's 1991 city council election technically was held under an un-precleared apportionment plan, the "drastic circumstances" do not exist that mandate this court's entering an order voiding the results of that election and requiring a special election to be held. An appropriate remedy is the one embodied in the settlement proposed between the Hispanic plaintiffs and the City in the pending section 2 litigation, for it contemplates that City elections held in due course in 1993 will

be conducted under an apportionment plan tailored upon the one that the Justice Department has already precleared. This prospective relief is, under the circumstances of this case, sufficient to satisfy the demands of section 5. *Louisville, supra*. As that settlement will be implemented by the section 2 court, this court need not issue a redundant order.

These cases are *DISMISSED*.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF HOUSTON, ET AL., Defendants.	§	No. 91-3076 (Consolidated)
JESSE CAMPOS, W.R. (RESENDEZ) MORRIS, AND MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON, v. CITY OF HOUSTON, ET AL., Defendants.	§	No. 91-3117

FINAL JUDGMENT

(Entered Aug. 21, 1992)

The Motion of the United States for Entry of Order Requiring Special Elections having been heard and determined as discussed in the attached Memorandum

Opinion, dated August 21, 1992, it is hereby ORDERED that the Motion is DENIED; and these cases are DISMISSED.

/s/ Edith H. Jones
Honorable
Edith H. Jones
U.S. Court of Appeals
for the Fifth Circuit

/s/ James DeAnda
Honorable
James DeAnda
Chief Judge
Southern District of
Texas

/s/ Sim T. Lake
Honorable Sim T. Lake
U.S. District Judge
Southern District of
Texas

Date: August 20, 1992